

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

Definitions

As used in this form, the following terms have the meanings stated:

- (a) *Commercial Item* — Has the meaning stated in the clause at FAR 52.202-1, Definitions.
- (b) *DEAR* — The Department of Energy Acquisition Regulations.
- (c) *DOE* — The United States Department of Energy.
- (d) *FAR* — The Federal Acquisition Regulations.
- (e) *Goods* — All tangible property, except land or interest in land, and including tooling, equipment, materials supplies, etc., used in connection with a subcontract.
- (f) *Government* — The government of the United States of America.
- (g) *Subcontract* — A subcontract is a legally binding agreement issued under the Prime Contract and between the University and a third party that contains the essential terms and conditions under which goods or services will be furnished to the University.
- (h) *Subcontractor* — The party entering into the subcontract with The Regents of the University of California.
- (i) *Lower-tier subcontractor* — An individual or legal entity that has entered into an agreement with a Subcontractor for the delivery of goods or services necessary for the Subcontractor's performance of the subcontract.
- (j) *University* — The Regents of the University of California, a constitutional corporation and instrumentality of the State of California, which operates Los Alamos National Laboratory under Prime Contract W-7405-Eng-36 with the Department of Energy.
- (k) *University's procurement specialist* — The representative of the University of California authorized to address contractual issues, and execute and/or administer subcontracts on behalf of Los Alamos National Laboratory.

Preamble

- (a) Pursuant to the terms of Contract W-7405-Eng-36, the University has agreed to appropriately treat requirements of federal statutes and Presidential executive orders in procurements using funds provided under the contract. Consequently, many of the standard terms and conditions contained herein are similar to terms and conditions used by federal agencies. However, the University is not a federal agency or instrumentality; the use of similar terms and conditions is only for the administrative convenience of the University.
- (b) The Subcontractor shall furnish the goods and/or services covered by the subcontract subject to all the terms and conditions set forth in the subcontract including the following, which the Subcontractor, in accepting the subcontract, agrees to be bound by and to comply with in all particulars, and no other terms or conditions shall be binding upon the parties unless hereafter accepted by them in writing. Written acceptance or shipment of all or any portion of goods or the performance of all or any portion of the services covered by the subcontract shall constitute unqualified acceptance of all University terms and conditions. The terms of any quotation referred to in the subcontract are included and made a part of the subcontract only to the extent of specifying the nature of the goods or services ordered, the price therefore, and the delivery thereof, and then only to the extent that such terms are consistent with the terms and conditions of the subcontract.
- (c) This form incorporates one or more FAR and/or DEAR clauses by reference. The version of the FAR and/or DEAR clause in effect as of the effective date of the subcontract shall apply with the same force and effect as if they were given in full text. Throughout these clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean "Subcontractor"; the term "subcontractor" shall mean "Lower-tier subcontractor"; and the terms "Government" and "Contracting Officer" shall mean the University. Upon request, the procurement specialist will make the full text of the clauses available.
- (d) The Subcontractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this subcontract.

"A" Clauses Apply to Subcontracts at All Dollar Levels

Clause A1 — Assignment of Claims

- (a) The Subcontract or any right, remedy, or obligation hereunder is assignable in whole or in part by the University to the Government or its designee. Under the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 (hereinafter referred to as the Act), the Subcontractor may assign its rights to be paid amounts due or to become due because of the performance of the subcontract to a bank, trust company, or other financial institution, including any

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any bank, trust company, or other financial institution.

- (b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under the subcontract and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of the subcontract.
- (c) The Subcontractor shall not furnish or disclose to any assignee under the subcontract any classified document, including the subcontract or information related to work under the subcontract until the University authorizes such action in writing.

Clause A2 — Changes

Changes in the terms and conditions of this subcontract may be made only by written agreement of the parties, see Preamble (b), above.

Clause A3 — Collect Shipments

Goods purchased f.o.b. shipping point must be forwarded freight collect. (Note: Government freight rates do not apply to prepaid shipments. Excess costs will be deducted from the amount invoiced for the goods if the goods are not shipped collect in accordance with the following instructions). The following notation must appear on the bills of lading or express receipt:

"This shipment is for the account of the U.S. Government, which will assume the freight charges. It is subject to the terms and conditions set forth in the standard form of the U.S. Government's bill of lading and to any available special rates or charges."

Clause A4 — Declared Valuation of Shipments

Except as otherwise provided on the face of the subcontract, all shipments by the Subcontractor under the subcontract for the University's account shall be made at the maximum declared value applicable to the lowest transportation rate or classification, and the bill of lading shall so note it.

Clause A5 — Delivery of Excess Quantities

The Subcontractor is responsible for the delivery of each item quantity within allowable variations, if any. If the Subcontractor delivers and the University receives quantities of any item in excess of the quantity called for (after considering any allowable variation in quantity), such excess quantities will be treated as being delivered for the convenience of the Subcontractor. The University may retain such excess quantities up to \$250 in value without compensating the Subcontractor therefore, and the Subcontractor waives all right, title, or interest therein.

Quantities valued in excess of \$250 will, at the option of the University, either be returned at the Subcontractor's expense or retained and paid for by the University at the unit price in the subcontract.

Clause A6 — Discounts for Prompt Payment

Discounts for prompt payment will be taken if it is in the University's best interest to do so, and if payment is made within the discount period stated in the subcontract, or offered on an individual invoice. In connection with any discount offered for prompt payment, time shall be computed from the later of receipt of material or the date the invoice is received at the following address: Los Alamos National Laboratory, Accounts Payable, Mail Stop P240, P. O. Box 1663, Los Alamos, NM 87545. For the purpose of computing the discount earned, payment shall be considered to have been made on the date the University check was dated or an electronic funds transfer payment was made.

Clause A7 — Disputes

(a) *Definitions.* For purposes of this clause:

- (1) "Board" means the Energy Board of Contract Appeals that has been established by the Secretary of Energy pursuant to Section g(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 607(a)(1).
- (2) "Arbitration decision" means a decision of the Board in an arbitration pursuant to this clause.

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

(3) "Claim" means a written demand or written assertion by either contracting party seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of a contract term, or other relief arising under or relating to this subcontract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant.

A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The Subcontractor may convert such submission into a claim if it is disputed either as to liability or amount, or is not acted upon in a reasonable time, by demanding a decision by the Procurement Manager.

(4) "Counterclaim" means a claim asserted in a pleading filed with the Energy Board of Contract Appeals in an arbitration proceeding pursuant to this clause which claim arises from the same occurrence or transaction relating to this subcontract that is the subject matter of the opposing party's claim. Counterclaims do not need to be submitted to the Procurement Manager for decision.

(5) "Procurement Manager" means a person designated by the University to decide claims of the Subcontractor or of the University against the Subcontractor.

(6) "Rules of the Board" means the Board's rules promulgated at 10 C.F.R. Part 1023, Subpart A.

(b) *Nature of This Subcontract.* This subcontract is not a Government contract and therefore is not subject to the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613). The parties agree that the DOE is not a party to this subcontract and is not directly liable to the Subcontractor for claims and disputes within the purview of this clause. Further, the parties agree that, for the purposes of this subcontract, the University is not an agent of the DOE, and that neither the presence of this clause in the subcontract nor provision for arbitration by the Board shall create or imply the existence of privity of contract between the Subcontractor and the DOE.

(c) *Scope of Clause.* The parties agree that the rights and procedures set forth in this clause are the exclusive rights and procedures for the resolution of all claims and disputes arising under, or relating to, this subcontract. The parties shall be bound by an arbitration decision, which shall be enforceable as provided in the Federal Arbitration Act (9 U.S.C. . § § 1 et seq.) and the terms of this clause.

(d) Submission of Claims by Subcontractor; Procurement Manager's Decision.

(1) Unless otherwise provided in this subcontract, the Subcontractor must file any claim against the University within 30 calendar days after the Subcontractor knew or should have known the facts giving rise to the claim.

(2) The Subcontractor must submit any claim in writing first to the University's procurement specialist, who shall attempt to resolve the matter within a reasonable amount of time. If the University's procurement specialist does not resolve the claim in a manner satisfactory to the Subcontractor, and the Subcontractor desires to pursue further action, the Subcontractor must submit the claim in writing to the Procurement Manager.

(3) Within sixty days of receipt of the claim, the Procurement Manager must issue a decision or notify the Subcontractor of the time within which a decision will be issued, which shall be reasonable, taking into account such factors as the size and complexity of the claim and the adequacy of the information provided by the Subcontractor in support of the claim. If the Procurement Manager fails to issue a decision on a subcontract claim within the specified period, the Subcontractor may make a demand for arbitration with the Board as if the claim had been denied.

(4) The University's procurement specialist may also submit a claim against the Subcontractor in writing to the Procurement Manager, who shall issue a written decision.

(5) The decision of the Procurement Manager shall be final and conclusive unless the complaining party demands arbitration by the Board in accordance with the terms of this clause.

(e) Demand for Arbitration

If the decision of the Procurement Manager is not satisfactory to a complaining party, and the complaining party desires to pursue further action, the complaining party must, within 45 days after receipt of the Procurement Manager's decision, submit to the Board a written demand for arbitration of the claim. The Board shall arbitrate the claim and any counterclaims in accordance with the Rules of the Board.

(f) Right to a Hearing; Costs. In any arbitration pursuant to this clause, both parties shall be afforded an opportunity to be heard and to present evidence in accordance with the Rules of the Board. Unless the Board orders otherwise, each party shall pay its own costs of prosecuting or defending an arbitration before the Board.

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

- (g) Arbitration Decisions Judicial Review. An arbitration decision shall be final and conclusive unless a party, within one hundred and twenty days after the date of receipt of a copy of the decision, files an action to vacate, modify, or correct the decision pursuant to the Federal Arbitration Act.
- (h) Subcontractor Performance Pending Claim Resolution. The Subcontractor shall proceed diligently with performance of this subcontract and shall comply with any decision of the University's procurement specialist or Procurement Manager, pending final resolution of any claim or dispute arising under, or relating to, this subcontract,.
- (i) No Other Court Action. No action based upon any claim or dispute arising under, or relating to, this subcontract shall be brought in any court except as provided in this clause.
- (i) Choice of Law. This subcontract shall be governed by Federal law as provided in this subparagraph. Irrespective of the place of award, execution or performance, this subcontract shall be construed and interpreted, and its validity determined, according to the Federal common law of government contracts as enunciated and applied to prime government contracts by the Board and Federal courts having appellate jurisdiction over the decisions of the Board rendered pursuant to the Contract Disputes Act of 1978. The Federal Arbitration Act and other Federal statutes (including the Contract Disputes Act of 1978), Federal rules (including the Federal Acquisition Regulation, the Department of Energy Acquisition Regulation, and the rules promulgated by the Board) shall apply in accordance with their respective provisions.
- (k) Interest. Interest on amounts adjudicated due and unpaid by a party shall be paid from the date the complaining party files a demand for arbitration with the Board. Interest on claims shall be paid at the rate established by the Secretary of the Treasury of the United States pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

Clause A8 — Equal Opportunity:

FAR 52.222-26 is hereby incorporated by reference.

Clause A9 — Excusable Delays

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify the University's procurement specialist in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the University's procurement specialist of the cessation of such occurrence.

Clause A10 — Inspection/Acceptance

The Subcontractor shall only tender for acceptance those items that conform to the requirements of this subcontract. The University reserves the right to inspect or test any goods or services that have been tendered for acceptance. The University may require repair or replacement of nonconforming goods or reperformance of nonconforming services at no increase in subcontract price. The University must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

Clause A11 — Patent Indemnity

The Subcontractor shall indemnify the University and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this subcontract, provided the Subcontractor is reasonably notified of such claims and proceedings.

Clause A12 — Payments

The University shall pay the Subcontractor, upon the submission of proper invoices or vouchers, the prices stipulated in this subcontract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this subcontract. Unless otherwise specified in this subcontract, payment shall be made on partial deliveries accepted by the University if

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

- (a) The amount due on the deliveries warrants it; or
- (b) The Subcontractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total subcontract price.

Clause A13 — Risk of Loss

Unless the Subcontract specifically provides otherwise, risk of loss or damage to the goods provided under this subcontract shall remain with the Subcontractor until, and shall pass to the Government (through the University) upon:

- (1) Delivery of the goods to a carrier, if transportation is f.o.b. origin; or
- Delivery of the goods to the University at the destination specified in the subcontract, if transportation is f.o.b. destination.

Clause A14 — State of New Mexico Gross Receipts and Compensating Tax

- (a) Within 30 days after award of the subcontract, the Subcontractor shall advise the State of New Mexico of this subcontract by registering with the State of New Mexico, Taxation and Revenue Department, Revenue Division, pursuant to the Tax Administration Act of the State of New Mexico, and shall identify the subcontract number.
- (b) To the extent required by New Mexico law, the Subcontractor shall pay the New Mexico gross receipts taxes, pursuant to the Gross Receipts and compensating Tax Act of New Mexico, assessed against the Subcontractor price paid for performance of the subcontract, or of any part or portion thereof, within the State of New Mexico. The allowability of any gross receipts taxes or local option taxes lawfully paid to the State of New Mexico by the Subcontractor or its lower-tier subcontractors will be determined in accordance with the Costs and Expenses clause at Dear 970.5204-13 of the subcontract except as provided in paragraph (d) of this clause.
- (c) The Subcontractor shall submit applications for Nontaxable Transaction Certificates (NTTC), From CSR-3C, to the State of New Mexico Taxation and Revenue Department, Revenue Division, P.O. Box 630, Santa Fe, New Mexico, 87509. The Subcontractor shall use the NTTC certificates strictly in accordance with the subcontract and the agreement between DOE and the New Mexico Taxation and Revenue Department.
- (d) The Subcontractor shall provide NTTC's to each vendor in New Mexico selling tangible personal property to the Subcontractor for use in the performance of the subcontract.
- (e) The Subcontractor shall pay the New Mexico compensating use tax for any tangible personal property that is purchased pursuant to a NTTC if such property is not used for federal purposes.
- (f) Out-of-state purchase of tangible personal property by the Subcontractor that would be otherwise subject to compensating tax shall be governed by the principles of this clause. Accordingly, compensating tax shall be due from the Subcontractor only if such property is not used for federal purposes.
- (g) The University may receive information regarding the Subcontractor from the Revenue Division of the New Mexico Taxation and Revenue Division of the New Mexico Taxation and Revenue Department and, at the discretion of the University, may participate in any matter of proceedings pertaining to this clause of the above-mentioned agreements. This shall not preclude the Subcontractor from having its own representative nor does it obligate the University to represent its Subcontractor.
- (h) The Subcontractor agrees to insert the substance of this clause, including this paragraph (h), in each lower-tier subcontract that meets the criteria in FAR 29.401-6 (b) (1) through (3), 48 CFR Part 29.
- (i) Paragraphs (a) through (h) of this clause shall be null and void should the agreement referred to in paragraph (c) of this clause be terminated; provided, however, that such termination shall not nullify obligations already incurred before the date of termination.

Clause A15 — Taxes

The subcontract price includes all applicable Federal, state, and local taxes and duties.

Clause A16 — Termination for Cause

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

The University may terminate this subcontract, or any part hereof, for cause in the event of any default by the Subcontractor, or if the Subcontractor fails to comply with any subcontract terms and conditions, or fails to provide the University, upon request, with adequate assurances of future performance. In the event of termination for cause, the University shall not be liable to the Subcontractor for any amount for goods or services not accepted, and the Subcontractor shall be liable to the University for any and all rights and remedies provided by law. If it is determined that the University improperly terminated this subcontract for default, such termination shall be deemed a termination for convenience.

Clause A17 — Termination for Convenience

The University reserves the right to terminate this subcontract, or any part hereof, for its sole convenience. In the event of such termination, the Subcontractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and lower tier subcontractors to cease work. Subject to the terms of this subcontract, the Subcontractor shall be paid a percentage of the subcontract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Subcontractor can demonstrate to the satisfaction of the University using its standard record keeping system, have resulted from the termination. The Subcontractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This clause does not give the University or Government any right to audit the Subcontractor's records. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

Clause A18 — Used or Reconditioned Material, Suspect or Counterfeit Material, Residual Inventory, and Former Government Surplus Property

- (a) The Subcontractor shall deliver items to the University which conform to the specifications to which they are represented to be manufactured. The Subcontractor shall not furnish any item or component that is used or reconditioned material; manufactured with suspect or counterfeit materials, parts, and/or components; residual inventory resulting from terminated Government contracts or subcontracts; or former Government surplus property unless such item or component was listed in the applicable attachment to the quotation and approved by the University's procurement specialist, or unless otherwise authorized in writing by the University's procurement specialist.
- (b) All items or components furnished under the subcontract shall comply with the terms and specifications contained in the subcontract.

Clause A19 — Warranty

The Subcontractor agrees that goods or services furnished under the subcontract shall be covered by the most favorable commercial warranties the Subcontractor gives to any customer for the same or substantially similar goods or services and the Subcontractor shall furnish copies of same to the University. The rights and remedies provided by such warranties are in addition to and do not limit any right afforded to the University by any other clause of the subcontract. Such warranties will be effective notwithstanding prior inspection and/or acceptance of the goods or services by the University.

Clause A20 ³/₄ Limitation of Liability

Except as otherwise provided by the Subcontractor's most favorable commercial warranty or by an express or implied warranty, the Subcontractor will not be liable to the University or Government for consequential damages resulting from any defect or deficiencies in accepted items.

Clause A21 — Commercial Computer Software

If this subcontract is for or includes commercial software, FAR 52.227-19 is hereby incorporated by reference.

"B" Clauses Also Apply to Subcontracts Exceeding \$2500

Clause B1 — Affirmative Action for Handicapped Workers:

FAR 52.222-36, is hereby incorporated by reference.

Los Alamos National Laboratory
TERMS AND CONDITIONS - COMMERCIAL ITEMS
July 2000

"C" Clauses Also Apply to Subcontracts Over \$10,000

Clause C1 — Affirmative Action for Special Disabled and Vietnam Era Veterans:

FAR 52.222-35, is hereby incorporated by reference.

"D" Clauses only apply when cited in the University's solicitation and/or Subcontract:

Clause D1 — Utilization of Small, Small Disadvantaged and Women-Owned Business Concerns / Subcontracting Plan

- (a) FAR 52.219-9 "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" is hereby incorporated by reference.**
- (b) FAR 52.219.8 "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns" is hereby incorporated by reference.**